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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 585

JEANNETTE A. NOEL, CATHERINE A. BROWN, PAULINE A. LANDIS, ROBERT L. ACKLEN, *Petitioners,*

v.

LDSON B. OLDS, JR., AMERICAN SECURITY AND TRUST COMPANY OF WASHINGTON, D. C., Executors and Trustees Under the Will of William Hayes Ackland, Deceased; ROLLINS COLLEGE, a Corporation, University of North Carolina, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

FRANK J. HOGAN,
JAMES C. ROGERS,
Counsel for Petitioners.

AUSTIN W. SCOTT,
ARTHUR J. PHELAN,
LESTER COHEN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Jeannette A. Noel, Catherine A. Brown, Pauline A. Landis and Robert L. Acklen, respectfully file and submit this as their petition for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the District of Columbia.

Said Court of Appeals on October 11, 1943, reversed a decision and judgment of the District Court of the United States for the District of Columbia in favor of petitioners and against respondents herein (R. 167-175). That deci-

sion as yet is not reported. The mandate has been stayed by proper order, and the cause is now filed and docketed herein for decision.

In the court below four separate appeals were taken from the decision and judgment of the District Court. Those appeals were consolidated for hearing (R. 92) and one opinion was rendered and one judgment was entered in that Court covering all four appeals. (R. 176.)

SUMMARY STATEMENT OF MATTER INVOLVED.

This was an action to construe a will. The original complaint filed by petitioners herein, challenged the validity of trusts set up in the will of William Hayes Ackland, who died in the District of Columbia on February 16, 1940, on the ground that they violated the rule against perpetuities. By said will testator's entire residuary estate was given to trustees under the following terms and conditions:

> "Item VII. All of the rest, residue and remainder of my property and estate, both real and personal, * * * I give, devise and bequeath, absolutely and in fee simple, unto my executors, hereinafter named, as trustees, to hold the same, *in trust*, in the manner and for the uses and purposes hereafter set out, that is to say:
> * * *
>
> (c) I direct my trustees to have erected upon the campus of said Duke University, at Durham, North Carolina, as soon after my death as arrangements therefor can reasonably be completed, a memorial building in the form of a gallery or museum, to include an apse for the interment of my remains, to be known as the William Hayes Ackland Memorial, substantially in accordance with plans for such a museum which said Duke University has heretofore submitted to me. I direct that the cost of said building shall be as estimated by the architect who prepared said plans, approximately Two Hundred Fifty Thousand Dollars ($250,000) but in no event more than Three Hundred Thousand Dollars ($300,000). When said building shall have been completed, I direct that my remains be transferred to the apse which is to be a part thereof, for

permanent interment in a marble sarcophagus beneath a recumbent statue. I further direct that there shall be placed and maintained in said building, on permanent exhibition, all of my tangible personal property and effects preserved for that purpose in accordance with the provisions hereinbefore contained, and such other objects of art as may be added thereto as hereinafter provided." (R. 10.)

The balance of the trust fund remaining in the hands of testator's trustees after erection of the building was to be held by the trustees with full powers of management, and said trustees

> "shall allow the net income arising therefrom to accumulate in their hands and shall invest and reinvest the same in accordance with the powers hereinabove set out, but such accumulations and the investments thereof shall be kept in a separate fund, from which there shall be paid such thereof as may be necessary to carry out the following directions, namely (R. 10-11): * * *
>
> Item VII (d) 7. After the completion of the building provided for in subitem (c) of this Item VII of my will, and after the fulfillment of all of the requirements upon the accumulated income from my trust estate, the entire remainder of such accumulated income shall be used and applied by my trustees for the perpetual maintenance and upkeep of said building and its contents, and for the acquisition of such objects of art as may be selected and designated by the governing body of Duke University, which objects, when acquired, shall be placed in said building on permanent exhibition, as well as for the enlargement of such building at such time or times as, in the judgment of my trustees, the enlargement thereof shall be feasible." (R. 12.)

The will directed that the trustees should have full and complete discretion in connection with the administration of the trust, and their decision in regard to any matter arising out of their administration was to be binding and conclusive upon all concerned. (R. 12.)

After the construction suit was filed, Duke University renounced all of the benefits, burdens and responsibilities

of the will insofar as it was concerned. (R. 29-30.) Testator's executors and trustees then filed an answer to the construction suit and also a cross-claim and counter-claim. The answer asserted the validity of the trusts and the cross-claim and counter-claim "demanded" that the court authorize them to erect upon the campus of the University of North Carolina, or Rollins College, or some other southern State university, or adequately endowed southern university an art gallery or art museum substantially in accordance with the plans which Duke University had submitted to the testator; that the court appoint a university to administer the foregoing provisions of the decedent's will; and that the court authorize and direct said trustees to apply the separate fund to be created out of the income of decedent's trust estate to repair and maintenance of the gallery thus erected and for the purchase and acquisition of such objects of art as might be selected by the governing body of the university substituted by the court in the place and stead of Duke University. (R. 28.)

The trial court decreed that because "Duke University having declined all of the provisions of said will, including all of the benefits, burdens and responsibilities thereof, and the trust having thus become impossible of performance in the particular manner set forth in the will, the trust has failed"; and that the executors and trustees named in the will "hold the remainder of the trust fund (after the payment of certain legacies) under a resulting trust for the next of kin of the decedent." (R. 90.)

Your petitioners are next of kin of decedent.

As indicated above, the court below reversed the judgment of the trial court and held that, even though Duke University declined the benefits of the will, the testamentary representatives could apply the trust fund *cy pres* and erect a building on the campus of some other university and utilize the remainder of the fund to maintain that building and buy objects of art to be placed therein (R. 167-175).

The court below ignored completely the question whether or not testator would have been satisfied to have his

body transferred to a building on the campus of the University of North Carolina or any other university; whether or not the duty of editing certain manuscripts written by the testator, imposed upon Duke University, could properly be transferred to the faculty of some other college or university or whether or not testator would have been satisfied to have all of his tangible personal property placed and maintained on permanent exhibition in a building on the campus of any institution other than Duke.

Petitioners have contended from the outset that testator's will was plain and unambiguous on its face; that there is no uncertainty in the will; that extrinsic evidence was neither necessary nor admissible to construe said will; and that a fair reading of the will conclusively established that the gift to Duke University was to a specific institution for a specific purpose and that it was impossible to find from the will itself that the testator had a general charitable intent as distinguished from the desire to perpetuate his name at Duke University in the specific manner provided for in his last will.

Respondents neither in the District Court nor in the court below made any claim whatsoever that testator's will was ambiguous or that a latent ambiguity arose as a result of the renunciation of Duke University. Nevertheless they pleaded, by way of cross-claim and counter-claim, quantities of extrinsic evidence, such as correspondence between Duke University and testator; a letter from the testator to the University of North Carolina and another to Rollins College; a former and revoked will of the testator executed more than two years before the date of his last will; and much concerning testator's early life and background. (R. 17-39)

In the trial court your petitioners moved for judgment on the pleadings under Rule No. 12 of the Federal Rules of Civil Procedure. At the hearing on that motion the trial court refused to consider extrinsic evidence and construed the will of testator as written. Judgment was granted in

favor of your petitioners that testator's executors and trustees held the residuary estate of the testator under a resulting trust in favor of his next of kin.

The executors and trustees appealed to the court below from that judgment, claiming that the trial court should have directed it to select some other university in the place and stead of Duke. Rollins College likewise appealed because it contended that, if Duke University renounced, it became entitled to the trust fund because it had at one time agreed with the testator to accept a testamentary gift from him and that it had been mentioned as an alternate beneficiary of the trust in a prior will.[1] The University of North Carolina likewise appealed from the judgment of the trial court. It was not named a party defendant in the original proceedings. It sought to intervene. It was not permitted to intervene. It appealed from the court's order refusing it permission to intervene. Its ground for intervention, as well as appeal, was that it was entitled to the trust fund because it was mentioned as a possible beneficiary in testator's prior will, in the event Duke University did not take the gift.

Your petitioners also appealed to the United States Court of Appeals from that part of the judgment of the lower court that upheld the pecuniary legacies bequeathed under Item VII (d) paragraphs 3, 4, 5 and on other grounds not pertinent here.

In the court below, at the outset, your petitioners filed a motion to dismiss the appeals of Rollins College, University of North Carolina, and of the executors and trustees on the ground that none of those appellants were parties aggrieved by the decision of the District Court. (R. 99-100) In that motion it was pointed out that Rollins College and the University of North Carolina were not aggrieved since they could not claim the fund as a matter of right any more

[1] Rollins College was named as a defendant in the trial court because it was a beneficiary under the will to the extent of $50 per year. See Item VII (d) 6 of the will, R. 11.

than could any other school or university in the country; they were not named as contingent beneficiaries in the will under construction and they lost no legal right by reason of the action of the trial court.

The right of the executors and trustees to take an appeal was challenged on the ground that they were not parties aggrieved, in that the judgment of the lower court merely provided how the residuary estate of the testator should be distributed and that, in the legal sense, they were not and should not be concerned in the slightest with the question of the distribution to appellees as next of kin of the testator. The executors and trustees have never claimed any pecuniary damage to themselves by reason of the decision of the trial court. Their action in appealing was purely in a representative and not an individual capacity.

Despite petitioners' request that the motion to dismiss be determined *in limine*, the case was set for argument on the merits. The rules of the court below (Rule 31(j)) provide that no oral argument will be permitted on motions unless directed by the court. No direction was given in the instant case, and the motion to dismiss was never argued. The court below has never passed upon the merits of the motion to dismiss.

Following the argument, the court below, on October 11, 1943, rendered its opinion and judgment reversing the lower court. In that opinion the merits of the appeals were discussed and decided. That court held that the judgment of the District Court must be reversed because the doctrine of *cy pres* is applicable in the District of Columbia and the case at bar is an appropriate one for the application of that doctrine.

The court below in its opinion and decision undertook to point out why the doctrine of *cy pres* should be applied in the instant case. In its opinion it made reference to, considered, and drew heavily from a prior and revoked will of the testator, without any explanation as to why it was necessary to refer to that prior will. It referred to, quoted

from, and based many of its conclusions on correspondence between an official of Duke University and the testator without any finding whatsoever that the will under consideration is ambiguous and that it was therefore necessary to resort to extraneous evidence in order to determine testator's intentions. As indicated above, no one has ever contended that a patent ambiguity existed in the will under construction or that a latent ambiguity arose by reason of the renunciation of Duke University.

Testator, in his last will, did not make any provision for the disposition of his estate in the event Duke University should renounce. He did not state any general charitable purpose. He did not state that he would be satisfied to be buried on the campus of any university other than Duke University. He did not state that if the faculty of Duke University refused to accept his manuscripts, edit them, and attempt to publish them, as it was charged to do under the will, he would be satisfied to have the faculty of some other university do that work in lieu of Duke.

The court below, however, undertakes to supply all of these omissions; it finds specifically what testator "would have wished" and what his "intention would have been, in the event which actually occurred". (R. 174, 175) For that matter, it undertakes completely to rewrite testator's will and substitute its judgment for the will of the testator. For example, Mr. Justice Miller, speaking for the court, said, "To the extent that the building to be erected on the campus of Duke University was to be used for university purposes, presumably Duke would be in charge of that use". However, despite the fact that testator made no mention of any other university and had dropped the name of one university and one college from his former will, the court says: "These functions could be as well or better performed by other universities" and the beneficiaries of the trust "could be as well or better served by other universities".

It is clear that in order for the *cy pres* doctrine to have any application the trust instrument must contain a general charitable intent. As has been said, testator failed completely to express any general charitable intent that he might have had in mind. The court below, however, says: "The dominant idea in the mind of the testator was the cause of art in the South". The expression, "cause of art", does not appear in testator's will at any point. The word, "south", does not appear in the will. The entire expression, "cause of art in the South", is taken from a letter written by the then President of Duke University to the testator. (R. 169)

The court below says that testator named Duke University to take his gift because of "blandishments" practiced upon him by the President of Duke. It then says that testator "had been assured that if he did so his purpose of forwarding the cause of art in the South would be carried out." (R. 174) This in spite of the fact that the day testator executed his last will he received a letter from the President of Duke, saying, "If * * * you leave the whole matter as it was when I was in Washington I shall not feel hopeful of the outcome * * *". (R. 169)

We see, therefore, that the court below surmises that testator would have made an alternate bequest to some other university but for assurances from Duke that it would accept testator's gift. The fact is testator was on notice that Duke might not accept and he did not name an alternate. While we contend it is improper to resort to extrinsic evidence we find, from such a reference, that testator named two alternates in his prior will.

As we have said, testator did not state that any other institution should be selected in the event Duke failed to accept his gift. Yet, the court below says: "He intended that the seat of his enterprise should be a university, * * *". The officials of Rollins College could not find that intention in testator's will because they claim the fund should go to it.

After a long discussion of the merits of the case and in the concluding paragraph of its opinion, the court below recognizes for the first time the motion to dismiss and disposes of it by stating: "Jeannette A. Noel, et al. filed a motion to dismiss all the appeals except their own. Action upon this motion was postponed until the case could be heard upon its merits. In view of our conclusion that the judgment of the District Court must be reversed, the motion is denied and the cause remanded with instructions * * *".

The decision of the appellate court is, therefore, that because in its opinion the case was improperly decided by the District Court it was unnecessary for it to determine whether or not it had jurisdiction to hear the appeals and to decide whether Rollins College, the University of North Carolina, and the executors and trustees of testator's estate were parties aggrieved by the decision of the trial court.

QUESTIONS PRESENTED.

Where the jurisdiction of an appellate court is challenged by an appropriate motion to dismiss an appeal, may that court proceed to a decision of a matter on the merits and ignore the challenge with the mere assertion that "in view of our conclusion that the judgment of the District Court must be reversed, the motion is denied"?

In the District of Columbia, can a party not aggrieved by a decision of the District Court take an appeal to the United States Court of Appeals for the District of Columbia?

Are executors and trustees named in a will parties aggrieved within the meaning of Title 17, Section 101 of the District of Columbia Code, 1940 edition, by a decision of the District Court construing a will and directing the manner in which testator's estate is to be distributed?

Is the doctrine of *cy pres* in force in the District of Columbia?

In construing a will, can resort be had to a former will of the testator, letters written by the testator, letters written to the testator, and other extrinsic evidence, in the absence of any finding that the will is patently ambiguous, or that a latent ambiguity has arisen by reason of some unforeseen circumstance?

Is the gift to Duke University in the case at bar one to a specific institution for a specific purpose, or does the will under construction show on its face a general charitable intent?

THE STATUTE INVOLVED.

Title 17, Sec. 101 of the District of Columbia Code, 1940 ed., provides as follows:

> "Any party aggrieved by any final order, judgment, or decree of the District Court of the United States for the District of Columbia, or of any justice thereof, may appeal therefrom to the said United States Court of Appeals for the District of Columbia; and upon such appeal the United States Court of Appeals for the District of Columbia shall review such order, judgment or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections. Appeals shall also be allowed to said United States Court of Appeals for the District of Columbia from all interlocutory orders of the District Court of the United States for the District of Columbia, or by any justice thereof, whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like; and also from any other interlocutory order, in the discretion of the said United States Court of Appeals for the District of Columbia, whenever it is made to appear to said court upon petition that it will be in the interest of justice to allow such appeal. (Feb. 9, 1893, 27 Stat. 435, ch. 74 § 7; Mar. 3, 1901, 31 Stat. 1225, ch. 854, § 226; Mar. 3, 1921, 41 Stat. 1312, ch. 125, § 12.)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

It is important that this Court pass upon the question whether or not a Federal court of appeals can determine a case upon its merits without first determining that it has jurisdiction, when that jurisdiction has been challenged. This question goes to the very roots of our entire judicial system.

It has been assumed for many years that the doctrine of *cy pres* has not been in force in the District of Columbia. Many estates have been settled and disposed of on that basis. In 1929 the court below said categorically that "the doctrine is not in force in this District * * *".[1] The trial court said it could not follow the *cy pres* doctrine because of the rulings of the court of appeals. Nevertheless, in the case at bar, the court below said "that the doctrine of *judicial cy pres* is applicable in the District has never been denied." It is important that this Court should determine whether or not a rule of property such as that involved in the *cy pres* doctrine can be upset by a court or whether that is the function of the Congress.

The decision of the court below is in conflict with decisions of this Court, decisions of other Federal courts, and prior decisions of its own in that it is predicated upon evidence outside the will, declarations of the testator, a prior and revoked will, and the court's own impressions of Duke University and its former President.

The court below has decided erroneously a question of general as well as Federal importance involving the law of charitable trusts. It has, in effect, held that wherever a gift to an educational institution fails, it is, nevertheless, to go to education. The doctrine of *cy pres* has never been extended as far as that.

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[1] *Graff* v. *Wallace*, 59 App. D. C. 64, 32 Fed. 2d 960.

This Court should review the law of charitable trusts in the light of present day economic conditions and fiscal problems. While it is admittedly in the public interest to encourage genuine charity, it is also a matter of grave public concern that the taxing powers of the federal government not be frustrated by the tendency to perpetuate anything having the remotest appearance of a charitable trust.[1] It is a fitting time for this Court to re-examine the entire problem in the light of present conditions and tendencies and lay down a standard that will guide Federal courts and taxing authorities in determining what gifts should be upheld as charitable, and hence can properly be applied *cy pres* and hence be accorded Federal tax exemption.

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[1] In the case at bar, testator left an estate of approximately $1,300,000 in securities, and tangible personal property including manuscripts, pictures, scrapbooks and statuary, appraised at an aggregate value of $898.20. (R. 4, 15.) He provided that a $300,000 building be built on the campus at Duke University and, when the building is completed he directs that "my remains be transferred to the apse which is to be a part thereof, for permanent interment in a marble sarcophagus beneath a recumbent statue. I further direct that there shall be placed and maintained in said building on permanent exhibition all of my tangible personal property and effects preserved for that purpose * * *". (R. 10.) He further provides that other objects of art selected by the governing body of Duke University may be placed in the building when acquired, but provides that no funds shall be available for this purpose until certain legacies have been paid out of the accumulated income of his trust estate, and certain other expenses paid. He also provides for the permanent maintenance and upkeep of the $300,000 building from the income of his trust estate, before objects of art can be purchased.

If the decision of the court below is upheld, the Federal government loses approximately $300,000 in estate taxes and the public generally will, for many years at least, look at testator's picture of Queen Victoria, his pieces of statuary, his manuscripts that he was unable to sell in his lifetime (R. 18), the outside value of which amounts to $898.20, unless the ultimate educational institution taking the gift stultifies itself by using the building for purposes not specified in the will.

PRAYER.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, commanding the said court to certify and send to this Court a full and complete transcript of the record and all proceedings in said United States Court of Appeals in said consolidated case therein entitled, namely, *Jeannette A. Noel et al., Appellants* v. *Edson B. Olds, Jr., et al., Appellees; Rollins College, a Corporation, Appellant* v. *Jeannette A. Noel et al., Appellees; Edson B. Olds, Jr., et al., Appellants* v. *Jeanette A. Noel et al., Appellees;* and *University of North Carolina, Appellant* v. *Jeannette A. Noel, et al., Appellees;* Nos. 8352-8353-8354-8355 respectively, to the end that said case may be reviewed and determined by this Court and that the judgment of the United States Court of Appeals for the District of Columbia may then be reversed.

JEANNETTE A. NOEL,
CATHERINE A. BROWN,
PAULINE A. LANDIS,
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By FRANK J. HOGAN,
JAMES C. ROGERS,
Counsel for Petitioners.

AUSTIN W. SCOTT,
ARTHUR J. PHELAN,
LESTER COHEN,
Of Counsel.